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WISE TERMINAL CO. *v.* MCCORMICK.

Sept. 12, 1807.

[58 S. E. 584.]

1. Limitation of Actions—Commencement of Action—Amendment of Pleading.—Where the cause and form of action are the same in both the original and amended declarations in an action by a brakeman for injuries sustained in attempting to board the tender of an engine, the amended declaration will not be regarded as stating a new cause of action, so as to bar the right of recovery, the amendment being made after the statute of limitations has run, merely because it charges the negligence complained of in varying form to meet different phrases of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

2. Evidence—Opinion Evidence—Subject of Expert Testimony.—In an action by a brakeman for injuries sustained in attempting to board the tender of an engine, witnesses shown to be competent may give their opinions with respect to the distance within which the engine could have been stopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2323.]

3. Evidence—Testimony on Former Trial.—Evidence held insufficient to excuse the failure to produce a witness or take his deposition, so as to warrant the introduction of his testimony on a former trial.

Error to Circuit Court, Wise County.

Action by W. B. McCormick, a brakeman, against the Wise Terminal Company, for personal injuries sustained in attempting to board the tender of an engine. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

Ayers & Fulton and *Bullitt & Kelly,* for plaintiff in error.
Wm. H. Werth, for defendant in error.

WHITTLE, J. The evidence in this case, which is before us the second time, was exhaustively reviewed on the former hearing and held not to establish actionable negligence on the part of the plaintiff in error, the Wise Terminal Company. Wise Terminal Co. *v.* McCormick, 104 Va. 400, 51 S. E. 731. It is now alleged that the second recovery is founded on substantially the same evidence, and must therefore be controlled by the former decision. On the other hand, the defendant in error contends that the evidence at the second trial, set out in the stenographic report, is not sufficiently identified to constitute part of the record, and the original record was brought up on a subpœna duces tecum to substantiate that assertion.

As a new trial must be granted on another ground, it is unnecessary to pass upon that question; but, before dismissing the subject, the objections to inadequate certification of evidence with which we are repeatedly confronted justify our again calling the attention of the profession to the importance of paying more regard to this essential feature in making up a record. Jeremy Improvement Co. *v.* Commonwealth, 106 Va. —, 56 S. E. 224.

The first assignment of error which claims our attention is to the action of the trial court in rejecting the plea of the act of limitations. The assignment proceeds upon the theory that the amended declaration makes a new case.

In this the plaintiff in error is mistaken, as an inspection of the pleading plainly shows. The cause and form of action are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet different phases of the evidence.

The principle is clearly stated in New River Min. Co. *v.* Painter, 100 Va. 507, 42 S. E. 300, as follows: "If an amended declaration assert rights or claims arising out of the same transaction, act, agreement, or obligation as that upon which the original declaration is founded, it will not be regarded as a new cause of action, however great may be the difference in the form of liability asserted in the two declarations."

That the case falls within the rule thus laid down will be seen from the statement, in the petition for a writ of error, that "the evidence on the last trial was confined mainly to the issue presented by the amended declaration; but the same issue was raised by the former declaration, and substantially the same evidence was introduced and * * * held insufficient to support a verdict."

Several assignments involve objections to the admission of opinions of witnesses with respect to the distance within which the engine could have been stopped. Subject to proper restrictions, based on the knowledge and experience of the witnesses, such evidence is admissible, and is usually relied on to prove that fact.

The next assignment is founded on the alleged effort of the plaintiff to discredit one of his own witnesses; but the record does not sustain the objection. The purpose of the examination, which is made the ground of exception, was to refresh the memory of the witness by reference to his testimony at the former trial, and not to impeach him.

Another error assigned is to the action of the court in allowing the testimony of the witness Campbell on the former trial to be read to the jury. The rule of practice, which, in civil actions at least, under certain circumstances, permits proof of what a wit-

ness stated at a previous trial between the same parties and upon the same issues, is conceded.

In 16 Cyc. 1088, the rule is stated thus: "The court must be satisfied (1) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced. The first three of these conditions render the reported evidence relevant. The fourth is necessary to justify the court in receiving it."

In the same work, at pages 1095, 1096, after declaring that such testimony is substitutionary, it is said: "The court will therefore insist upon being satisfied, not only that the situation of the case promises some advantage from its use, but also that a sufficient reason be shown why the original witness is not produced, and that it is impossible, fairly speaking, for the person offering the evidence to produce the living witness or to take his deposition." In note 24, on the quantum of proof necessary, it is declared that, "inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted, as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant has caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised"—citing Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

Illustrations of what constitutes due diligence in such cases are given at page 1098, note 32: "To ascertain by writing to the postmaster of a certain town in a distant state that a former witness is not in the postmaster's town, but in another town of the postmaster's state (the Texas case, *supra*), or to show that the witness is reputed to be out of the state (Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa, 37, 25 N. W. 918), or for an officer charged with the service of a subpœna to report that he has made diligent search for a witness at the supposed residence and been informed by persons unknown to him that they had heard that the witness was dead (Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706), have been held under the facts of these particular cases not to be sufficient. Alleged absence from the jurisdiction must be established by the testimony of some one who knows the fact, or can testify to circumstances within his knowledge which will justify the inference of such fact. Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa, 27, 25

N. W. 918; Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510. Statements by persons with peculiar means of knowledge may, together with lack of further opportunity for inquiry, suffice to admit the evidence. Thus, in case of an attesting witness, the reply of his parents that he was in America was considered by Mr. Justice Erle as 'reasonable evidence that the witness is out of the jurisdiction of the court.' Austin *v.* Rumsey, 2 C. & K. 736. The mere fact that a party who could have summoned a witness has perferred to rely on his promise to attend voluntarily is no reason for admitting the witness' former evidence. Provo City *v.* Shurtliff, 4 Utah, 15, 5 Pac. 302. The action of the court in deciding what search is sufficient will not be revised, in the absence of evidence of gross abuse of discretion. Vaughan *v.* State, 58 Ark. 353, 371, 24 S. W. 885; Clinton *v.* Estes, 20 Ark. 216."

In further discussion of the subject in the text, it is observed: "The more modern tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to require further that the party offering the evidence should show to the satisfaction of the court that he could not by the use of reasonable diligence have procured the deposition of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence, and that, from ignorance of the witness' whereabouts or other reason, his deposition could not have been given."

The Virginia statute (Va. Code 1904, § 3365) provides that in a civil case at law a deposition taken on proper notice may be read, if, when offered, the witness be dead or out of the state. But it has been held that hearsay evidence that the deponent has left the country and has not returned is not sufficient to authorize the reading of his deposition. Collins *v.* Lowry, 2 Wash. 75 (2d Ed. 97). See, also, Powell *v.* Manson, 22 Grat. 177, 187, and cases cited.

Campbell resided at Pulaski, Va., and the foundation laid for admitting his former testimony was the statement of the sheriff of Wise county that he sought him at Blackwood and heard that he had left. The defendant in error also testified that in response to his inquiries he learned that Campbell had left Blackwood, and believes he heard that he had gone to Knoxville. He says that at Norton a young man from Pulaski told him he did not think Campbell was at home. He likewise made inquiry of a man at Tom's Creek, who said that if Campbell was at Pulaski he did not know it, but that he had been absent from that place for several weeks, perhaps for one or two months. Witness admitted that he had neither written to Pulaski concern-

ing Campbell's whereabouts, nor otherwise inquired for him at his home. It is true a subpœna, directed to the sheriff of Wise county, was returned "Not found"; but manifestly the return of an officer of a bailiwick other than that in which the witness usually resides affords but scant evidence of the fact that he is beyond the process of the court.

The preliminary evidence relied on in this instance is obviously insufficient to have warranted the introduction of Campbell's testimony at the first trial.

Errors are assigned to the action of the court in giving and refusing certain prayers; but they are dependent on evidence, and, as we cannot anticipate that the precise questions involved will likely arise at the next trial, it is unnecessary to notice these exceptions.

For the error of the trial court in the particular indicated, we are of opinion to reverse the judgment complained of, to set aside the verdict of the jury, and remand the case for a new trial.

Note.

The decisions in Virginia and West Virginia are harmonious as to the point that: "Where an amendment of the pleading is filed, and does not introduce a new or different cause of action, so far at least as the statute of limitations is concerned, it will have the same effect as if it had been filed at the time the suit was commenced; and a cause, which was not then barred, will not be treated as barred at the time of the amendment; that the filing of the original bill, rather than the amendment, is the commencement of the action. Lamb *v.* Ceoil, 28 W. Va. 653; Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49; Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336; New River Min. Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

See also, Dorr *v.* Rohr, 82 Va. 359. There is no attempt made here to give an extensive review of the cases from other jurisdictions, only a limited number of these being noted. "The general rule is that an original and amended bill form one entire bill, the amendment being regarded as having relation to the commencement of the suit. True, when any new matter or claim is introduced, this rule does not operate to deprive the defendant of the right to insist upon the statute of limitations if the bar is complete when the amendment is allowed; but, when no new matter or claim is introduced, the allegations being varied as to a subject within the lis pendens, then the statute will run only to the filing of the original bill." King *v.* Avery, 37 Ala. 169; Adams *v.* Phillips, 75 Ala. 461; 39 Ala. 554, 9 S. W. 553. In Liby *v.* Tobbein, 103 Missouri 447, Black, J., makes the following statement of the rule. "The rule then laid down is to this effect, where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point." In the opinion of Woolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, it is said that: "At the time of the commencement of the action the statute had not formed a bar, and the subsequent amendment of the declaration did not extend the running of the statute to the time of amendment." The Georgia code, section 3333, fixes the filing of the declaration as the commence-

ment of the action. Therefore, where no new cause of action is introduced by an amendment, but the amendment simply completes the statement of the cause which the pleader meant to set forth when the declaration was prepared and filed, the statute of limitations is satisfied if the declaration was filed before the action was barred. Holton *v.* The Western Union Telegraph Co., 19 S. E. Rep. 843, 94 Georgia 435. An amendment within the power of the court to allow, is not the beginning of a new action, so as to subject the suit to the operation of the statute of limitations, which was not a bar at the time of instituting the action. Guild *v.* Parker, 43 N. J. L. (14 Vroom) 430. Where an additional count, filed long after the commencement of the action, is a mere restatement, by way of amendment to the cause of action set up in the original counts, the additional count does not introduce a new cause of action, and the statute of limitations is not a good plea when the original action was begun in apt time. Blanchard *v.* Lake Shore & M. S. Ry. Co., 126 Ill. 416, 18 N. E. 799. In Culp *v.* Steere, 28 Pac. 987 (Kas.) the action was brought within proper time, so as not to be barred by any statute of limitations but the amendment was not made until more than three years had elapsed after the purchase and sale of a horse, and the plaintiffs recovered in the action. It was held, that the cause of action upon which the plaintiffs recovered was not barred by any statute of limitations. Link *v.* Jarvis, 33 Pac. (Cal.) 206, contains the following remark on this subject. "An amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in; and in such case the statute ceases to run when the original complaint is filed. Barber *v.* Reynolds, 33 Cal. 497; Allen *v.* Marshall, 34 Cal. 165; Lorenzana *v.* Camarillo, 45 Cal. 125." As to when a general direction as to when an act is begun so as to stop the running of the statute of limitations, see 12 Law Reg. 675.

CLEAR CREEK WATER CO., Inc., *v.* GLADEVILLE IMP. CO.

Sept. 12, 1907.

[58 S. E. 586]

1. Eminent Domain—Extent of Power—Acquisition of Water Rights—Statutes.—Under Va. Code, 1904, § 1105c, cl. 2 (f), authorizing public service corporations to condemn "sand, earth, gravel, water or other material," and sections 1105f (4) and 1105f (5), prescribing the procedure for condemning any "land or other property or any interest or estate therein," and section 1105f (9), as amended by Acts 1906, p. 452, c. 257, providing that, on the payment of the compensation awarded and the confirmation of the report of the commissioners in proceedings to condemn property, the title shall vest in the petitioner, and declaring that nothing in the act shall authorize the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is instituted, which revises the law on the subject as embodied in Code 1873, c. 56, § 11, and Code 1887, c. 46, § 1079, a public service corporation may condemn a partial